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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BERNARDINO SANTANA,

Defendant and Appellant.

G028756

(Super. Ct. No. 00CF0936)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dennis S. Choate, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela A. Ratner Sobeck and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

Bernardino Santana was convicted of, inter alia, assault with a firearm, shooting from a motor vehicle and receiving stolen property. He contends the court's

instructions on assault were prejudicially defective and there is insufficient evidence to support his convictions. We disagree with these contentions and affirm the judgment.

* * *

On the evening of March 28, 2000, Santana and his brother Javier were visiting Elizabeth Medina in her apartment when her boyfriend Oscar Gomez arrived. An argument ensued, during which Gomez shoved Santana. Then Gomez's friend Rigoberto Colin arrived and told the Santana brothers to leave, which they did.

Later that night, the Santana brothers returned to the apartment complex with others in a blue pickup truck. Colin, Francisco Aguilar and another man were drinking in the carport area at the time. As the truck passed them by, Santana raised a gun outside the passenger window and someone in the truck asked Colin if he wanted trouble. This prompted Colin and Aguilar to run for cover. As they did, Santana fired a shot, and the truck drove away.

When Aguilar reached his apartment, he called 911 and told the operator that someone in the truck shot at Colin. A short time later, Police Officer James Geist arrived at the scene. Aguilar told him the shooter leaned out the passenger window of the truck and fired at Colin. He even demonstrated how the shooter's arm was extended in Colin's direction.

Upon arrest, Santana admitted he was at Medina's apartment on the night in question. However, he said he left when Gomez got hostile and did not return to the complex. Eventually, he conceded he returned in the truck with the others. But he continued to prevaricate on a number of issues, including whether the gun was real and whether it was loaded. He finally admitted holding the gun when it fired, but he insisted it went off by accident and was pointed at the ground, not Colin, when it did. In his next breath, Santana conceded he held the gun "out the window towards the victim."

After his interview, Santana led officers to a shed where he had stashed the gun following the shooting. He claimed he bought it from "someone on the street" in

December 1999. The gun actually belonged to Raul Rodriguez, from whose house it had been stolen in May 1998. Forensic testing on the weapon revealed it could only be fired by pulling the trigger and could not go off by accident. Officers looked for bullet impact points at the scene, but they did not find any.

At trial, Aguilar was unable to recognize Santana as the shooter. He said the passenger in the truck pointed the gun at Colin, but then Colin ran, “so the shot went up.” Later in his testimony, Aguilar said the shooter did not point the gun at Colin and simply fired it into the air. Aguilar admitted he told Officer Geist he saw the gun pointed at Colin. He also admitted his memory of the shooting was better at the time he spoke to Geist than it was at trial.

I

The trial court instructed the jury an assault occurs when a person, with the present ability to do so, “willfully and unlawfully commit[s] an act which by its nature would probably and directly result in the application of physical force against” another. As the Attorney General rightly concedes, this definition does not fully comport with the intent requirement enunciated by our Supreme Court in *People v. Williams* (2001) 26 Cal.4th 779. Under *Williams*, “assault requires *actual knowledge* of those facts sufficient to establish that the offending act by its nature would probably and directly result in physical force being applied to another.” (*Id.* at p. 784, italics added.) In other words, defendant’s knowledge of the relevant factual circumstances must be proven to satisfy the intent requirement. (*Id.* at p. 788.) Nonetheless, the failure to so instruct “is unlikely to affect the outcome of most assault cases” because the defendant’s knowledge of these circumstances is rarely in dispute. (*Id.* at p. 790.)

Such is the case here. At trial, the central issue was whether Santana actually committed an act that was likely to lead to a battery, i.e., did he, or did he not, fire a shot in Colin’s direction. There was no dispute as to whether Santana was subjectively aware of the factual circumstances surrounding the alleged act, such as the

presence and general location of the victim. Therefore, the court's failure to instruct on the "actual knowledge" element of assault was harmless beyond a reasonable doubt. (*People v. Williams, supra*, 26 Cal.4th at p. 790; *People v. Raviart* (2001) 93 Cal.App.4th 258, 268-269.)

II

Santana also claims there is insufficient evidence to support the jury's determination he fired the gun toward Colin. He relies primarily on Aguilar's testimony that the shooter fired the gun into the air. Aguilar also testified the shooter did not point the gun at Colin. At another point in his testimony, however, he said the shooter *did* point the gun at Colin. Aguilar also admitted telling Officer Geist that the shooter pointed the gun at Colin. And Geist also said Aguilar told him the shooter fired at Colin. Aguilar told the 911 operator the same thing. Even Santana conceded he held the gun "out the window towards the victim." Of course, this was after he claimed the gun went off by accident while he was pointing it at the ground. But investigators did not find any bullet impact points in the ground. Viewing the record as a whole, and drawing all inferences in the favor of the prosecution (*People v. Johnson* (1980) 26 Cal.3d 557, 578), there is sufficient evidence from which a reasonable jury could find Santana fired the gun towards Colin. Accordingly, we affirm Santana's convictions for assault with a firearm and discharging a firearm from a motor vehicle.

III

Santana was also convicted of receiving stolen property, i.e., the gun. He asserts the conviction cannot stand because there is insufficient evidence he knew the gun was stolen. Again, we disagree.

Receiving stolen property is only a crime if the defendant knows the property was stolen. (Pen. Code, § 496.) However, such knowledge can be proved by circumstantial evidence, such as the defendant's failure to offer a satisfactory explanation as to how he came to possess the stolen item or from suspicious circumstances

surrounding his possession of the item. (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1019-1020.)

Santana's claim that he bought the stolen gun from "someone on the street" is not a satisfactory explanation of how he came into possession of the item. In fact, it comes perilously close to making the prosecution's point. It is devoid of details which might cast it in an innocent light. Instead, it suggests a shady transaction involving peddlers of stolen goods, known as fences. It describes precisely – albeit tersely – the kind of transaction by which a person would buy a stolen gun. As the Attorney General points out, buying the gun from a stranger also allowed Santana to avoid registration of the weapon and the requisite background check. Although by no means overwhelming, the evidence is sufficient to support the jury's determination that Santana knew the gun was stolen.

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

ARONSON, J.